

Eleanor D. Acheson
Executive Vice President, Chief Legal Officer
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November 5, 2019

Mr. Edward Hasbrouck
Consultant
The Identity Project
1222 Preservation Way, Suite 200
Oakland, CA 94612

Subject: Freedom of Information Appeal of
Freedom of Information Act Request #15-FOI-00021

Dear Mr. Hasbrouck,

This letter is in response to your February 4, 2019 appeal of your October 29, 2014 Freedom of Information Act (FOIA) requests. Your appeal was received by this office on February 11, 2019. For the reasons set forth herein, I have denied your appeal.

A. BACKGROUND

On October 29, 2014, you submitted a request to the National Railroad Passenger Corporation (Amtrak) FOIA Office in which you sought the following:

- (1) "Any records of policies, procedures, technical specifications, contracts (including agency appointment agreements), or directives to staff, contractors, or agents pertaining to transfers of data about Amtrak passengers or customers to the Department of Homeland Security (DHS), and DHS component including US Customs and Border Protection (USCBP), the Canadian Border Services Agency (CBSA), any other Canadian government agency, or any other foreign government, or the subsequent handling or use of such data, including without limitation Advanced Passenger Information (AP) and any personally identifiable data obtained or derived from the ARROW reservation system.
- (2) Any records pertaining to the legal basis for such data transfers, including any email messages pertaining to this subject within or between Amtrak, Amtrak agents, Amtrak contractors, and any third party or parties.
- (3) Any records of policies, procedures, technical specifications, contracts (including agency appointment agreements), or directives to staff, contractors, or agents (including without limitation travel agencies and agents authorized to sell Amtrak tickets, and other ARROW users) regarding disclosures to be made concerning transfers of data about Amtrak passengers or customers to government agencies including DHS.
- (4) Any records of policies, procedures, reports, or directives to staff, contractors, or agents (including without limitation travel agencies and agents authorized to sell Amtrak tickets, and other ARROW users) regarding compliance with the Personal Information Protection



and Electronic Documents Act (PIPEDA) of Canada, including handling of requests for records or other requests or complaints made pursuant to PIPEDA and any disclosures to be made to passengers or customers.

- (5) Any e-mail messages within or between Amtrak and Amtrak agents, Amtrak contractors, and any third party or parties containing any of the text strings 'Personal Information Protection and Electronic Documents Act', 'PIPEDA', or 'Privacy Commissioner of Canada'.
- (6) Any electronic file in which any of the above records are included.
- (7) All metadata pertaining to any such file, such as file system information indicating the creation data, modification date, etc.

Additionally, you requested that any records held in electronic form be provided in the original electronic form in which they are held, as complete bitwise digital copies of the original e-mail archive files, word processing files, or other electronic files, including any file headers, embedded metadata and all file content."

On October 30, 2014, Ms. Sharron Hawkins of the Amtrak FOIA Office acknowledged your request. In early March of 2015, during a telephone conversation, Ms. Hawkins advised that Amtrak was still in the process of searching for records responsive to your request and that Amtrak was prepared to provide you with an interim response. Between March 11, 2015 and December 21, 2018, Ms. Hawkins sent you 11 interim responses to your original request. Each response included documents that were responsive to your request and advised that if you do not agree with Amtrak's decision to withhold the above-referenced information, you may file an appeal of the FOIA Office's decision¹. Ms. Hawkins's final response advised "that in order to respond to your request, Amtrak's FOIA Office contacted all offices that were likely to have responsive records. This is the last set of records."

In response to Ms. Hawkins' final response, you contacted the Amtrak FOIA Office by e-mail to advise that "with respect to several of the categories of requested records, we have received neither any responsive records, any indication that responsive records were found to be exempt, nor any indication that a search for such records was conducted but that no records were found."

Ms. Rebecca Conner responded to your e-mail and advised that Ms. Sharron Hawkins has retired from the FOIA Office. She also advised that she reviewed the 11 responses that Ms. Hawkins previously sent and she believes that your request was responded to in its entirety and that the

¹ The first eight responses provided for a 30-day timeframe in which to appeal the FOIA Office's decision. Interim responses nine through eleven were sent after enactment of the FOIA Improvement Act of 2016 and provided for a 90-day timeframe in which to appeal.



FOIA Office considered your request closed. She also advised that pursuant to Amtrak's FOIA regulations, if you do not agree with Amtrak's decision, you may file an appeal.

B. THE BASES OF YOUR APPEAL

There appear to be six bases of your appeal as follows: 1. the adequacy of Amtrak's search; 2. the withholding of all requested metadata; 3. all withholdings as "Non-Responsive" of portions of files containing otherwise-responsive records; 4. all withholding of attachment files included in, or linked to, responsive e-mail messages; 5. the failure to produce responsive records in the requested form or any text-searchable form; and 6. the substitution for the responsive records of newly-created files in a less useful format, neither the original nor the request format. Each of these bases is discussed below.

1. the adequacy of Amtrak's search.

Your appeal challenges the sufficiency of the Amtrak FOIA Office's search. Among other things, you claim that obviously responsive records were not produced. You assert that Amtrak's search failed to identify its privacy policy, which you found at the Amtrak.com website, and deemed responsive to your request for "(1) Any records of policies...pertaining to transfers of data about Amtrak passengers or customers of the Department of Homeland Security (DHS)", "(2) and "the legal basis for such data transfers", and "(3) Any records... of policies...regarding disclosures to be made concerning transfers of data about Amtrak passengers or customers to government agencies including DHS." You also note that because the FOIA Office did not produce any records in response to items (4), (5), (6), or (7) of your request and "no exemption was claimed with respect to any of these records, and there is no indication that any search was conducted for such records" that "[i]t appears likely that no such search, or and inadequate search, was conducted."

2. the withholding of all requested metadata.

Your item (7) of your request sought all metadata pertaining to the otherwise responsive files produced in response to your FOIA request. You note that the PDF files were apparently created in response to your request and that the "PDF files contained no searchable text, although they appear to have been created from records that were originally found or created as digital text files. The PDF files contained only rasterized images of 'page views' or screenshots or portions of responsive records." According to your appeal, the FOIA statute requires that in making a record available to a person, an agency is required to "provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."

3. all withholdings as "Non-Responsive" of portions of files containing otherwise-responsive records



In your appeal, you note that some portions of files were redacted and withheld as non-responsive and no exemption was claimed. As an example, you attached a record with large blocks of redacted text that is marked as non-responsive without further explanation. You assert that no exemption was claimed as the basis for any of these withholdings of portions of files and that all portions of such files are responsive to item (6) of your request. You believe that all withholdings are plain error and must be reversed and that the responsive files should be produced.

4. all withholding of attachment files included in, or linked to, responsive e-mail messages

Your appeal asserts that copies of responsive email messages that were produced in response to your request contain icons that indicate that the original email messages included attachments that were not produced. According to your appeal, it is your presumption "that these attachments are actually included in the responsive digital records of email messages, as they are held on mail servers or on backup or archival digital media. And where an icon in a view or image of a responsive e-mail record indicates that the original message contained an attachment, a search reasonably calculated to retrieve responsive records would include a search for each file indicated as included as an attachment in the responsive email messages, including a search of the original digital records on servers or backup or archival media." You further assert that the failure to conduct a search for these files was an error and should be reversed and a new search conducted on remand.

5. the failure to produce responsive records in the requested form or any text-searchable form; and

Your appeal states that since the 1996 FOIA amendments, the FOIA statute has required an agency to provide records requested in "any form or format requested by the person if the record is readily reproducible by the agency in that form or format." (citing to the FOIA at 5 U.S.C. § 552 (f)(2)). Your appeal asserts that it is obvious that digital files are readily reproducible by Amtrak in the form of bitwise digital copies and that Amtrak failed to search for the metadata, which was the subject of item (7) of your request.

6. the substitution for the responsive records of newly-created files in a less useful format, neither the original nor the request format

Your appeal asserts that in responding to your FOIA request the Amtrak FOIA Office created PDF files. You further note that "the PDF files contained no searchable text, although they appear to have been created from records that were originally found or created as digital text files. The PDF files contained only rasterized images of 'page views' or screen shots or portions of responsive records, as those records were view in some unspecified software application(s)." And "[n]one of



these thousands of images were text-searchable, making it prohibitively burdensome to search, index, or organize the underlying responsive textual data.”

C. DISCUSSION

As you have indicated in your appeal and as evidenced by the record, Ms. Hawkins provided interim responses to your FOIA request. The last of Ms. Hawkins’ responses was sent to you on December 21, 2018. In this response, Ms. Hawkins notified you that the Amtrak FOIA Office had contacted all offices that were likely to have responsive records and that she was providing you with the last set of records. As with the interim responses, Ms. Hawkins advised you of your right to appeal Amtrak’s decision to withhold records within 90 days of the date of her letter. Your appeal with respect to the final eleventh interim response was received within this timeframe. We received no timely appeals with respect to the first ten interim responses; therefore, those responses and the records produced by Amtrak will not be addressed in this response.

Although you state that there are six bases of your appeal, we believe that several of the bases articulated are duplicative and therefore can be combined into three categories as follows: 1. the adequacy of Amtrak’s search; 2. the failure to produce responsive records in the requested form; and 3. the withholding of “non-responsive” portions of files containing otherwise-responsive records and attachment files included in, or linked to, responsive e-mail messages. Each of these bases is discussed more fully below.

1. The adequacy of Amtrak’s search

In response to a FOIA request, the FOIA requires an agency to make a search for records that is “reasonably calculated to uncover all relevant documents.” (*Weisberg v. DOH*, 705 F.2d 1344, D.C. Cir. 1983). The Court of Appeals for the District of Columbia Circuit has held that “the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.” *Jennings v. DOJ*, 230 F. App’x 1, 1 (D.C. Cir. 2007) (quoting *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)). In searching for records, agencies are required to make “more than perfunctory searches and, indeed, to follow through on obvious leads to discover requested documents.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325, 336 U.S. App. D.C. 386 (D.C. Cir. 1999), citing *John Doe Agency*, 493 U.S. at 151 and *Campbell v. DOJ*, 164 F.3d 20, 28, 334 U.S. App. D.C. 20 (D.C. Cir. 1998).

It is clear from the record that the Amtrak FOIA Office diligently searched for records in response to each of the items in your request. The Amtrak FOIA Office contacted all offices within Amtrak that were likely to have responsive records. These offices conducted records searches which



yielded a large number of records that were reviewed by the Amtrak FOIA Office. The fact that a specific record was not discovered does not mean that a reasonable search was not conducted.

As you noted in your in appeal, the FOIA Office did not produce any records in response to items (4), (5), (6), or (7) of your request. Items (4) and (5) are requests for specific records. Item (6) is a request for the electronic file in which any of the above records are included and item (7) is all metadata pertaining to any such file. Although, as you note, no exemption was claimed with respect to any of these records, the record includes evidence that a search for records related to items (4) and (5) was conducted. The record also provides evidence that Ms. Hawkins considered whether it would be possible to provide items (6) and (7) and determined that due to the fact that the records would need to be redacted, it would not be possible to provide these items. Ms. Hawkins should have advised you of this fact in her response.

2. The failure to produce responsive records in the requested form

The FOIA provides in responding to requests an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency is required to make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section. (See 552 (a)(3)(B)). When the Amtrak FOIA Office receives responsive records from Amtrak personnel, the records are reviewed. If there are no exemptions to be applied, the records may be released in the original form. If there are applicable exemptions, the FOIA Office utilizes the Adobe Acrobat tool to redact records which results in the creation of a PDF formatted document. This is the format that was readily reproducible in response to your request. Amtrak is unable to provide the records in the format you requested.

3. The withholding of "non-responsive" portions of files containing otherwise-responsive records and attachment files included in, or linked to, responsive e-mail messages.

In your appeal, you note that some portions of files were redacted and withheld as non-responsive and no exemption was claimed. Your appeal also asserts that copies of responsive email messages that were produced in response to your request contain icons that indicate that the original email messages included attachments that were not produced. We have reviewed the records that were included with the FOIA Office's December 21, 2018 response and determined that this basis of your appeal is not applicable as no portions of the records were withheld and redacted as non-responsive and there were no emails produced. Therefore, I have not addressed the merits of this basis of your appeal.



D. CONCLUSION

The Amtrak FOIA Office diligently responded to your complex FOIA request. The record is replete with evidence that it conducted a search that was reasonably designed to discover all responsive documents. Those documents were provided to you in the format that was readily reproducible to Amtrak. Accordingly, as discussed herein, the decision of the FOIA Officer to deny your request is upheld and your appeal is denied. You are advised that you may seek judicial review of this determination in accordance with the provisions of 5 U.S.C. § 552(a)(4) (2000).

Sincerely,

A handwritten signature in black ink, appearing to read "Eleanor D. Acheson", with a long, sweeping horizontal line extending to the right.

Eleanor D. Acheson
*Executive Vice President, Chief Legal Officer,
General Counsel & Corporate Secretary*